Statement of E. W. Metcalf
Builder of the ship Delphine.
before
H. R. Judiciary Committee
1876.

STATEMENT

OF

E. W. METCALF,

Builder of Ship Delphine.

BEFORE

H. R. Judiciary Committee,

JANUARY, 1876.

Gentlemen of the Committee:

Ship *Delphine*, built by me in Bangor, Maine, was destroyed by the English steamer *Sea King* or *Shenandoah*, on December 29, 1864.

Her captain, who owned one-eighth of the ship, was, with his wife and child, landed, entirely destitute, in Australia.

Neither the captain nor myself had any insurance.

As soon as the captain reached home, I transmitted to the Department of State a relation of the facts, with evidence of loss, requesting that measures be taken to secure indemnity therefor from the Government of Great Britain, or that my own Government should indemnify me, in fulfilment of its obligation to protect its citizens from wrongful injury.

Several months later the *Shenandoah* returned to her home in England, and was surrendered to the British authorities.

On learning this, I immediately started for England, intending to libel her in the English courts.

On my way to the Liverpool steamer at New York, I

learned that Mr. Adams had taken possession of the *Shenandoah*, for the benefit of the United States, and that we were thus deprived of our remedy against *her*.

Yet, on learning that my Government had officially declared—

"That a violation of neutrality by the Queen's proclamation and kindred proceedings of the British government is regarded as a national wrong and injury to the United States, and that the lowest form of satisfaction for that national injury that the United States could accept would be found in an indemnity, without reservation or compromise, by the British government to those citizens of the United States who had suffered individual injury and damage by the vessels of war unlawfully built, equipped, manned, fitted out, or entertained and protected in the British ports and harbors," (Correspondence Concerning Claims *vs.* Great Britain, vol. 3, p. 588,)—

I rested content in the hope of ultimate indemnity.

The history of the correspondence and negotiations between the two Governments is a long one, and doubtless familiar to you all.

During the progress of these negotiations the President recommended to Congress that—

"Authority be given for the settlement of these claims by the United States, so that the Government shall have the ownership of the private claims, as well as the responsible control of all the demands against Great Britain."

(Message of President Grant, December 5, 1870.)

Before Congress had time to act upon this suggestion the Joint High Commission was appointed, which resulted in the Treaty of Washington and the Geneva Tribunal.

But Secretary Fish and his associate Commissioners in negotiating the Treaty seemed to assume that Congress would take some action which would be equivalent to the

President's recommendation to assume and pay these claims, for, although special provision was made for all claims of private citizens *other than Alabama claims*, the Alabama claims were treated as belonging exclusively to the Government, no mention whatever being made in the Treaty of any interest of private individuals in them.

They have ever since been thus treated by this Government. The Secretary of State instructed the agent and counsel of the United States at Geneva that—

"The President desires to have the subject discussed as one *between the two governments*, and he directs me to urge upon you strongly to secure, if possible, the award of a sum in gross. In the discussion of this question, and in the treatment of the entire case, you will be careful not to commit the Government as to the disposition of what may be awarded. * * If the value of the property captured or destroyed be recovered *in the name of the Government, the distribution of the amount recovered will be made by this Government, without committal as to the mode of distribution.*"

(Papers relating to Treaty of Washington, vol. 2, p. 114.)

The counsel therefore said to the Tribunal at Geneva: "These claims are all preferred by the United States as a nation against Great Britain as a nation, and are to be so computed and paid." (Papers, &c., vol 3, p. 16.)

To show the reason for and the effect of this course, I quote from "A Short History of Long Negotiations," pp. 16, 19, 23, 24, 25, and 26:

"This arrangement was of great importance. It was important that the Government should be left free to distribute whatever amount might be recovered as indemnity to the losers, according to principles of equity and justice, uncontrolled by any question of international obligation. It was *more* important that the Government should be in a position to labor in all its dealings with the Tribunal to establish those principles which would be most advanta-

geous in the future to itself as a nation, and to guard against the danger that by the action of the Tribunal neutral nations should be held to such strict accountability for the acts of their subjects as to make their position difficult and dangerous. The interests of private claimants were opposed to the broader interests of the nation in these respects. It was well for the nation to relieve itself from the embarrassment under which it would have been placed had it gone before the Tribunal as agent or attorney for these private claimants, with the obligations which such relations would impose. * *

"Secretary Seward had insisted that England owed apology and indemnity for her hasty recognition of the Confederates as belligerents, and relied on this to support the claims of private citizens. He had declined all plans of arbitration which should not consider this recognition as a basis of these claims. England, after persistent refusal, had at last consented that it be so considered. But President Grant, for reasons exclusively national, refused to base any claim in the Treaty, or in our case against England, on the fact of her having exercised her right with ill-judged and unfriendly haste. He thus virtually abandoned a part of the claims of citizens of the United States against England. It would have been wrong for him to have done otherwise. It was condoning England's fault for a consideration valuable to the nation, thus transferring England's obligation, so far as concerned citizens of the United States, to the Government of the United States. But the nation could afford, and had the right, to act upon the President's recommendation to indemnify these citizens for England's wrong. It could not afford, had not the right, to sacrifice its own interests or lessen its power for good among the nations."

The Treaty limited the Tribunal to the consideration of claims "growing out of acts of the several vessels," and required the Tribunal: "First. To determine as to each vessel separately, whether Great Britain has, by any act or omission, failed to fulfill any of the duties set forth in three new rules, or recognized by the principles of inter-

national law not inconsistent with said rules, and certify such fact as to each of the said vessels," thus determining for the future the liability of neutrals in similar cases, but conferred the power, by article 7, to award a sum in gross for *all the claims referred to it.*

Great Britain was nominally held derelict as regards the acts of only two vessels, with their tenders, and a part of the acts of a third, but $15,500,000 was awarded as the sum in gross to be paid by Great Britain to the United States for *all the claims referred to the Tribunal.*

"This determining and limiting the liability of neutrals for the future was of vast importance to the United States, of vastly greater importance than the amount awarded, for we had disposed of the only difficulty which could be likely to cause war among ourselves, and settled those questions which might have involved us in war with others. We had reason to expect to be at peace, and to be neutral. It might, however, have been unfortunate for individual sufferers if their rights as regards either nation had been determined by these purely national considerations."

"The United States, (although going before the Tribunal as a belligerent with a case against a neutral,) 'regarding the mere question of the amount of national damages to be awarded as secondary to the higher consideration of the welfare and the honor of the United States,' (Papers, &c., vol. 3, p. 224,) expressly stated by its counsel to the Tribunal that 'both the sentiments and the interests of the United States, their history and their future, have made, and will make them, the principal advocates and defenders of the rights of neutrals before all the world. It is not for their interests to exaggerate the responsibilities of neutrals, but only in the sense of their action in this respect, throughout their whole national lifetime, to restrain the field of arms, and enlarge that of peace.' (Same, p. 223.)

"Hence, when the arbitrators decided, as regards so many of the vessels, that England had not violated the three rules, or the laws of nations, thus defining the effect

and value of those rules and laws for all future time, it was a decision in favor of, not against, the United States.". . . .

This decision, so valuable to the United States as a nation, restricted the rules of neutral obligation so much as to exclude about $1,200,000 of actual loss by destructions (my own ship among the number) for which our Government would undoubtedly have indemnified its citizens had the settlement been made by Congress, as advised by the President, for "Losses occasioned by *all Confederate cruisers* outside of Confederate waters would have been paid. The United States had justly demanded of Great Britain full indemnity for the acts of all these cruisers, basing this demand upon the Queen's proclamation granting belligerent rights, which was, and which our Government had declared to be, 'the cause, and the only cause,' in which 'this evil had its origin.'

"The Government, after having so definitely and completely endorsed and insisted upon this obligation to its citizens, *could not*, in a settlement with those citizens, have *ignored* this obligation." (See Five Minutes in Reply, bound herewith.)

Under the facts as portrayed in the above quotations, I confidently waited until the subject of the distribution of the Geneva Award was under consideration by Congress, and then briefly stated my case to this committee. (See Builder of ship *Delphine* before H. R. Judiciary Com.)

They reported a bill which provided indemnity for all of the excluded $1,200,000. It passed the House by a large majority. The Senate, although adopting the same theory, provided for only a part of the sufferers. But, by joint agreement, the balance of the award remains a fund from which Congress may hereafter authorize the payment of other claims thereon.

Being still left without redress, I again, last session,

stated my case to the committee, and they again reported in my favor; but for want of time no action was reached.

I said:

The Government of the United States was in possession of money received by virtue of the award at Geneva, according to the Treaty of Washington.

The money had been paid by Great Britain to the United States "as the indemnity" for injuries inflicted upon this nation, in the person of its citizens, through the fault of England.

It was awarded "for the *satisfaction of all the claims* referred to the consideration of the Tribunal." (1)

By the Treaty of Washington, and this award, "all the claims growing out of the acts committed by the several vessels" were, as against England, "fully, perfectly, and finally settled." (2)

My ship *Delphine* had, through the fault of England, been destroyed by one of these vessels. Before her destruction my Government had officially notified the government of Great Britain that it would "claim redress for the injuries which might be inflicted" on me, as a citizen of the United States, by such destruction.

Allow me to quote these notices from the diplomatic correspondence. They all relate to the *Shenandoah* before Melbourne:

(*No.* 1171.)

DEPARTMENT OF STATE, WASH., *Dec.* 3, 1864.

SIR: Information has reached this Department to the effect that the British steamer *Laurel*, reported to have sailed from Liverpool with Semmes and one hundred picked men, met by appointment the English steamer *Sea King* at the Desertas of the Madeira, and there transferred to the *Sea King*, Semmes and crew, armament, munitions, and stores....

Thus it would seem that the notorious commander of the *Alabama* has again obtained command of a British-

built vessel, which has been supplied by another British vessel with men, arms, and munitions carried out from a British port, and is now at large on the high seas for the purpose of committing depredations upon the commerce of the United States.

I will thank you to bring the case under the attention of Earl Russell, protesting against any such arrangement as that above indicated, and informing his Lordship that if it is correctly stated this Government considers that Her Majesty's government may be held justly responsible for any losses accruing to citizens of the United States through the depredations of the Sea King.

I am, sir, your obedient servant,

WILLIAM H. SEWARD.

CHARLES FRANCIS ADAMS, Esq., &c.

(Correspondence Concerning Claims vs. Great Britain, vol. 3, p. 330.)

As soon as it had knowledge of the destruction of my ship, this Government again officially notified that it "could not avoid entailing upon the government of Great Britain the responsibility for this damage."

(*No.* 1250.)

DEPARTMENT OF STATE,
WASHINGTON, *Jan.* 27, 1865.

SIR: Referring to my dispatch of the 3d ultimo, No. 1171, in regard to the *Sea King* or *Shenandoah*, and to subsequent correspondence on the subject, I now transmit a copy of a dispatch from James Monroe,* Esq., the consul of the United States at Rio de Janeiro, containing a statement in relation to the destruction of four United States merchant vessels, with their cargoes. . . . It appears from the information presented with Mr. Monroe's dispatch that, with the exception of the name of the commander, the representation contained in my No. 1171 is corroborated. Under these circumstances *I have to request you to inform Her Majesty's government that the United States will claim redress for the injuries and losses*

* Mr. Monroe now represents the 18th District of Ohio in the House of Representatives.

inflicted on their citizens by the depredations of the Sea King *or* Shenandoah.

I am, sir, your obedient servant,

WILLIAM H. SEWARD.

CHARLES FRANCIS ADAMS, Esq., &c., &c., &c.

(Correspondence, Claims, &c., vol. 3, p. 335.)

My Government did claim of Great Britain redress for the injuries inflicted on me.

(*Adams to Russell.*)

LEGATION OF THE UNITED STATES,
LONDON, *April* 7, 1865.

MY LORD: I have the honor to transmit to you a copy of a letter addressed to the Secretary of State at Washington, by the consul of the United States at Rio Janeiro, Mr. Monroe, making a report of the depredations committed upon the commerce of the United States by the vessel known in the port of London as the *Sea King*, but since transformed into the *Shenandoah*. This same vessel has been, since the date of Mr. Monroe's letter, heard of at Melbourne, from which place further details of similar outrages have been received....

Were there any reasons to believe that the operations carried on in the ports of Her Majesty's kingdom and its dependencies to maintain and extend this systematic depredation upon the commerce of a friendly people had been materially relaxed or prevented, I should not be under the painful necessity *of announcing to your Lordship the fact that my Government cannot avoid entailing upon the government of Great Britain the responsibility for this damage*....

So far as I am aware, not a single vessel has been engaged in these depredations excepting such as have been furnished from the ports of Her Majesty's kingdom; unless, indeed, I might except one or two passenger steamers belonging to persons in New York, forcibly taken possession of in the beginning of the war, feebly armed, and very quickly rendered useless for any aggressive purpose....

I am reluctantly compelled to acknowledge the belief that practically this evil had its origin in the first step

taken, which never can be regarded by my Government in any other light than as precipitate, of acknowledging persons as a belligerent power on the ocean before they had a single vessel of their own to show floating upon it. The result of that proceeding has been that the power in question, so far as it can be entitled to the name of a belligerent on the ocean at all, *was actually created in consequence of the recognition*, and not before; and all that it has subsequently attained of such a position has been through the labor of the subjects of the very country which gave it the shelter of that title in advance.

CHARLES FRANCIS ADAMS.

Right Hon. Earl Russell, &c., &c., &c.

(Same, p. 345.)

Thus my Government claimed of Great Britain redress for the injuries inflicted on me, [3] and by the Treaty of Washington "fully, perfectly, and finally settled" the claim, [2] receiving therefor in the Geneva award full satisfaction in money; [4] and satisfaction again, in the value of the *Shenandoah* herself, when the Government of the United States, for its own benefit, deprived me of remedy against *her*.

It also received, in other considerations more important than money, vastly more than full compensation. [5]

Under these facts, I, last year, thought it not unreasonable to ask you to recommend legislation which would insure to me indemnity for my loss. [6]

In support of my prayer, I urged that the owners of ship *Delphine*, all of whom I represent, had suffered by the wrongful acts of England, from which we had the right to ask protection of our Government; that our Government had condoned the wrong, had deprived us of all remedy against England, and in the condoning had received abundant compensation for the injury done to us; that this nation had endorsed our claim; that we still held that endorsement, for the settlement with the respondent by the endorser, where he receives full value for the

claim, cannot cancel, but must strengthen, the obligation of that endorser to the claimant; that our Government refused to give the Tribunal jurisdiction of the question who should share in the distribution of the award; [7] that the Tribunal refused to take such jurisdiction; [8] that the Tribunal was purely international, and could have no jurisdiction over questions of obligation of either government to its subjects; that no question of obligation of government to its citizens was submitted to or considered by the Tribunal; hence its action could decide no such question, or impose on this Government any trusteeship or obligation other than to administer its award with impartial justice.

Your committee listened favorably to my prayer, and framed a bill which, had it been enacted, would have secured justice.

It provided for the payment—

"First. For all loss, destruction, or damage by any Confederate cruiser, for whose acts the Government of the United States have made demand upon the government of Great Britain."

But certain parties who had suffered no injury by the fault of England, but had been largely benefited by the consequences of that fault, [9] opposed the passage of your bill, and demanded, on purely technical grounds, that they should be included, and sufferers like myself excluded in the distribution of the award.

Their demand was supported by the influence and ability of the ablest lawyers whose services they could secure. And although the bill, as reported by you, passed the House of Representatives by a large majority, it failed of approval in the Senate.

A law was enacted which practically provided indemnity for actual loss caused to insurance companies by Confederate cruisers, whether included or not in the rules

of international obligation determined at Geneva; but it provided no indemnity for me and many others who, like me, had suffered direct loss through England's fault.

Even this law was opposed by attorneys of insurance companies, because it did not, besides *indemnity*, provide for the payment to them of enormous sums, in addition to the enormous profits which the wrongful acts of England had enabled them to secure, and this notwithstanding the fact that, as regards the fault of England, their claims "fall within that elementary rule of damages, so familiar to the legal profession, that only such damages are recoverable as are the direct, immediate, necessary result of the act." For they need not have paid a single dollar of the loss even though England's wrongful acts had caused the destruction of every American ship afloat. Their having to pay was the result of their *own act*, by which they, in the hope and realization of great gain, *voluntarily assumed the risk*. It was in no sense the necessary result of England's fault. That fault only gave them the opportunity, which they so eagerly embraced, to enlarge their profitable business.

The payments authorized by this law appropriate about half of the Geneva Award, the balance remaining "a fund from which Congress may hereafter authorize the payment of other claims thereon."

In view of these facts and this precedent, I again, humbly but earnestly, pray that your committee recommend Congress to authorize the payment of such claims as mine.

I am aware that we, as citizens, have no *legal* remedy against our Government. But does not this fact, together with the fact that Congress makes the laws and makes the courts to administer them, changing either at its will, remove the whole matter from the atmosphere of mere legal technicalities to the higher one of moral obligation?

and for Congress, emphasize the question, what is *right?* What *ought* the law to be?

The International Tribunal made, could make, no law for the distribution of its award. Governments only, no citizens, as such, had any part in or were represented in the Tribunal, or in that portion of the Treaty which created it. Hence, no *citizen* was either included or excluded by its decision.

This nation is morally forbidden to plead as a bar to my claim that it was nominally not included in the Tribunal's rules of international obligation, for the exclusion depended on the fact that this Government accepted an apology and three new rules, of value to itself, as "the means of" so "reducing the measure of the complaint and demand for indemnity before the Tribunal" [10] as to insure such exclusion, [11] the exclusion itself being of very great value to this nation. [5]

When this Government abandoned the claims for compensation founded on the Queen's proclamation, [11] it, for its own interests, withdrew from the case, and refused to place before the Tribunal as a basis for its claims that great initial wrong of Great Britain, which was "the cause, and the only cause," in which "this evil had its origin," "from which all the grievances seem deducible," without which no Confederate vessel could have existed outside of Confederate waters or Anglo-Confederate vessel destroyed a single ship. [12]

It was the right and the duty of this Government to do as it did, for it was a great nation acting for itself, in the interest of all its people.

Had it been, as some claim it was, acting as collecting agent for a few individuals, such conduct would have been so dishonest and dishonorable as to exclude any attorney from practicing at any bar.

If this abandonment of the sure foundation for a part of the claims, and limiting the evidence to the "acts committed by the several vessels," practically insured the decision [13] which the best interests of this nation required, did it not transfer to this nation the moral obligation to indemnify those who suffered by the wrong?

As so well expressed in the report of this committee, (p. 7)—

"Having for its own interest withdrawn from the Arbitrators the 'cause and only cause of the evil,' thus leaving the Tribunal without evidence of that liability of England which the United States had over and over again in every diplomatic form insisted upon, is not the United States estopped from denying reparation to its citizens based upon the finding of a tribunal, to which, for its own purposes, it would not submit the evidence? Indeed, by so doing, did not our Government assume this class of losses of its citizens?"

Our Government demanded and received a gross sum as "*satisfaction of all the claims*"—a sum which is and doubtless *was intended by the arbitrators* to be sufficient to enable our Government to indemnify from this fund all loyal American citizens who suffered actual loss on the sea through England's fault.

"What is due to *Great Britain* in regard to this matter" has been asked by those who claim that we are bound by the award to exclude those who lost directly by the fault of England, in order to add, from the sum awarded as indemnity for that fault, millions of dollars to the millions of profit already secured by insurers in consequence of that fault.

The question is answered and the view I take fully sustained by the crown lawyers of England and by the official action of that government.

British property was in and British underwriters had insured the cargoes of ships which were destroyed by the *Alabama*. They, claiming that by the Geneva Award American citizens had been indemnified for similar loss, asked indemnity of their government.

Under the advice of the law officers the British government rejected their claim. [14]

During debate in the British Parliament. Mr. Anderson asked: "If we were obliged to pay for damage sustained by the Americans, by reason of the conduct of the *Alabama*, why were we not equally bound to pay for the damage sustained by our own subjects by reason of the acts of that vessel?" [15]

Mr. Gladstone, then Prime Minister, said: "It appears to be implied that the government submitted the claims of *certain persons* not subjects of Her Majesty to arbitration."

"*This is altogether a mistake. No claims of individuals have been submitted to arbitration in relation to the* Alabama."

"*What was submitted to arbitration was entirely a question between the two governments.* [16]"

Our Government refused in advance to be controlled in its relation to its citizens by the decisions of the Tribunal. [17]

It promised to distribute the amount recovered, [18] but refused to be committed as to the mode of distribution, and instructed its counsel at Geneva to avoid all such committal, which they did.

Yet the opinions of the Arbitrators are entitled to the utmost consideration, and should be followed wherever applicable. None of their utterances seem more reasonable or of broader application than "Whereas, in order to arrive at an equitable compensation for the damages

which have been sustained, it is necessary to set aside all double claims for the same losses."

This, as well as their opinion regarding "prospective earnings," "gross freights, so far as they exceed net freights," and interest, were deemed applicable, and have been adopted in the law for the partial distribution of the fund which was enacted last session.

The double claims for the same losses, when insurers claimed pay from the assured and also from the Government, were set aside. Insurers, however, were not required to refund any part of the double pay for their losses, which they had already received from the assured. And they were allowed to take into their account all their losses occasioned by all the Confederate cruisers, without regard to the decisions of the Tribunal, and whether or not occasioned by a cruiser for whose acts the Government of the United States had made demand upon the government of Great Britain.

With these facts and this precedent before you, can any member of your Honorable Committee fail to believe that my prayer is fully within the bounds of justice and reason, and endorsed by the demands of national honor?

I ask for less in principle than Congress has already provided for insurance companies, for although the 11th section of the law seems to exclude all losses except those caused by the *Alabama*, *Florida*, and their tenders, and the *Shenandoah*, after her departure from Melbourne, the 12th section allows those insurance companies which lost by these vessels, and thus gained a standing in the Court to take into account *all their losses by all the Confederate vessels during all the war*. Only five small companies are thus excluded from the Court; their aggregate loss was but $48,163. I see no reason why the law should discriminate against them.

To be as liberal in principle to others as Congress has already been to insurance companies would involve the payment of all that is provided in Mr. Luttrell's bill and about $200,000 more for actual loss caused by the little vessels called the "Musquito fleet"—the *Boston*, *Calhoun*, *Echo*, *Jeff. Davis*, *Winslow*, *Sallie*, *Savannah*, and *St. Nicholas*.

Granting my prayer will involve the appropriation of but a very small part of what will remain of the fund, for our loss, with interest, is but little more than $125,000

It will require less than $1,200,000, exclusive of interest, to indemnify for *all the losses* occasioned by *all* those cruisers for the acts of which our Government demanded indemnity of Great Britain, and which are not already provided for by law.

The events of the war have enriched other claimants and enabled them to employ what they esteemed the ablest legal talent in the world to argue in favor of their claims. These same events compel me to depend upon my own recital of the simple facts, trusting that *you* will make the arguments in favor of the right.

To obviate all questions as to facts, I will, with your permission, submit references to authorities, with quotations. They substantiate every statement I have made.

E. W. METCALF.

January, 1876.

Last Congress Hon. Mr. Evarts had the attention of this committee for about three hours.

I was promised *five minutes* in which to reply, but failed to get the time.

Will you allow me to now read what I would then have said?

FIVE MINUTES

In reply to Argument for Insurance Companies, before H. R. Judiciary Committee.

BY E. W. METCALF.

January, 1874.

Hon. Mr. Evarts quoted from the President's message, as follows:

"I therefore recommend to Congress to authorize the appointment of a Commission, to take proof of the amount and the ownership of these several claims, * * and that authority be given for the settlement of these claims by the United States, so that the Government shall have the ownership of the private claims, as well as the responsible control of all the demands against Great Britain." [1]

Then, speaking in behalf of insurance companies, Mr. Evarts claimed that the President thus acknowledged an obligation of the Government to its citizens, the nature or measure of which subsequent negotiations and treaties have not changed, except that it is strengthened by the fact that indemnity in money has been received by the Government for England's fault.

This suggests the inquiry—Who would have received indemnity in the settlement, had the course so recommended by the President been adopted?

FIRST.

No distinction could or would have been made between losses caused by the *Georgia* and the *Alabama*, or between the *Shenandoah* before and after Australia, for no distinction existed in their history, in the wrongfulness of their acts, or in the losses which they occasioned. The distinctions *afterward made* by the Tribunal related to the questions of *international* obliga-

1. President's Message, Dec. 5, 1870.

tion, and are of vast prospective importance and value to this nation, but did not touch the question of obligation to our own citizens.[2]

SECOND.

Losses occasioned by *all Confederate cruisers* outside of Confederate waters would have been paid, for the United States had justly demanded of Great Britain full indemnity for the acts of all these cruisers, basing this demand upon that act of Great Britain which was, and which our Government had declared to be, (I quote its words,) "precipitate,"[3] "unprecedented,"[3] "unjustifiable," "the cause, and the only cause,"[4] in which "this evil had its origin,"[5] "from which all the grievances seem deducible,"[6] which "actually created,"[7] gave "birth"[7] to their belligerent power, "by acknowledging persons as a belligerent power on the ocean before they had a single vessel floating upon it."[7]

And even after the nation had, for considerations of *national importance only*, "abandoned the claims for compensation founded upon the Queen's proclamation,"[8] and basing its claims only on the small resultant remainder of the wrong, the United States *still* insisted that the "obligation to make full compenration for the acts of these vessels was entailed upon Great Britain,"[9] and asked the Tribunal at Geneva to make an award in gross, and, in considering its amount, to take into account the losses of individuals in the destruction of their vessels and cargoes by the *Sumter*,[10] *Nashville*, *Retribution*,[12] *Tallahassee*,[13] etc.

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2. Correspondence, etc., Claims *vs.* Great Britain, vol. 5, pp. 577, 586 to 591.
3. Same, Vol. 3, pp. 533, 534.
4. Same, Vol. 1, p. 226.
5. Same, Vol. 1, p. 292.
6. Same, Vol. 1, p. 242.
7. Same, Vol. 1, p. 292; Vol. 3, p. 533.
8. Papers relating to Treaty of Washington, Vol. 3, pp. 196, 209.
9. American Case, p. 163.
10. Same, p. 132.
11. Same, p. 133.
12. Same, p. 156.
13. Same, pp. 164, 165.

The Government, after having so definitely and completely endorsed and insisted upon this obligation to its citizens, *could not*, in a settlement with those citizens, have *ignored* this obligation.

THIRD.

Insurance companies would not have received a dollar; for their claims upon the Government for compensation, where property on which they had paid the insurance has been lost or destroyed, "have always been dismissed, on the ground that they were paid for the risk, and could not ask the Government to hold them harmless."[14]

FOURTH.

The Government, by such settlement, and making full indemnity for all the loss to individuals, caused by ALL the Confederate cruisers, would have paid out millions of dollars less than it has since received as indemnity from England; for all the actual unindemnified loss caused by all those cruisers, not included in the rules of international obligation established by the Geneva Tribunal, does not exceed $1,200,000, while the Tribunal justly awarded to the NATION indemnity for all the property destroyed by the cruisers which were included in those rules, deducting nothing for the indemnities which individuals had received, which amount to about $5,750,000.

Thus the Government has in its possession money, received as indemnity for England's fault, sufficient to pay its citizens for all their losses directly resulting from that fault, and at least $4,500,000 more, which, if its original obligation had not been changed by subsequent negotiations, the Government is at liberty to disburse to those who suffered less directly from England's wrong, but to which insurance companies can make no claim.

Have subsequent negotiations changed the obligation? Does the fact that England has indemnified this nation for a wrong to itself, which *was no wrong but a benefit to insurers*, create

14. Letter from W. B. Washburn.

an obligation, *which did not before exist*, to hold insurers (who were paid their own price for the risks they took) harmless from the consequences of their own voluntary act? *Especially*, when the Tribunal which awarded the indemnity rejected the claim of insurers, and enunciated a broad principle which must always exclude them, in these words:

"*Whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses.*" [15]

Has the surrender by our Government, *for its own benefit*, of the principal foundation for the claims of its citizens, and the settlement, *so advantageous to itself*—which cancels and bars those claims against England, and transfers the obligations to this country—*relieved* the Government from its obligation, *which did before exist*, to settle with those citizens? [16]

Although the President and Senate alone have exclusive jurisdiction over international questions, and the undoubted right to surrender for the public benefit any claim of private citizens as against a foreign power, have they alone any *legislative* authority?

Would such surrender cancel the claim, or only transfer the obligation to this nation?

Could the President and Senate alone make or change any law touching the obligation of the Government to the people?

Could they delegate to a Tribunal any power which they themselves did not possess?

If not, could the Tribunal at Geneva make any law for the distribution of its award which would be binding upon the Congress or courts of the United States?

Did the Government of the United States, in matters relating to the Treaty of Washington, act for itself, to protect *its own* dignity, honor, and interests, and establish great principles of international law and precedents, which shall benefit its people and all peoples for all time; or, did it act simply as an attorney, employed by certain individuals who had, or fancied they had, sundry claims against England?

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15. Award of the Tribunal.

16. Papers, etc., Vol. 3, p. 223; Vol. 2, p. 216; and "Short History of Long Negotiations."

If the first, its success was complete and glorious, one in regard to which every American may rejoice and be proud; if the second, only partial, and at best of slight importance.

Which view of the case will Congress take, in its legislation for the distribution of the Geneva Award?

If an attorney, it may say to certain of its clients: "Your bill is collected—here is your money;" and to others: "Your bill was not collected; there is nothing for you."

The disappointed client may ask: "Why not? Was not my loss as real and my claim as just as that of him you paid?"

"Oh, yes! and even more so," attorney replies; "but, for certain reasons of great importance to *myself* it was thought not best to have judgment issue for such claims as yours."

If an attorney, a selfish and dishonest one! Every honorable impulse says No! Not an attorney acting for a few individuals, but a great nation, acting for itself and for humanity!

I have expressed these views as a business man. I feel sure that the business men of the country will endorse them.

E. W. METCALF.
Builder of Ship Delphine.

NOTES.

1.

"In case the Tribunal find that Great Britain has failed to fulfil any duty or duties as aforesaid, it may, if it think proper, proceed to award a sum in gross, to be paid by Great Britain to the United States *for all the claims referred to it.*" (*Treaty of Wash., Art.* 7.)—"The Tribunal, making use of the authority conferred upon it by Art. 7 of the said treaty, by a majority of four voices to one, awards to the United States the sum of $15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, *for the satisfaction of all the claims referred to the consideration of the Tribunal.*" (*Decision and award. Papers relating to Treaty Wash., vol.* 4, *p.* 53.)—"It does not appear in the protocols how the arbitrators arrived at this amount. I am informed that it was reached by mutual

concessions. The neutral arbitrators and Mr. Adams, from the beginning of the proceedings, were convinced of the policy of awarding a sum in gross. * * * We therefore devoted our energies toward securing such a sum as should be practically an *indemnity* to the *sufferers*. Whether we have or have not been successful can be determined only by the final division of the sum."—(*Mr. Davis' Report, same vol.* 4, *p.* 8.)

2.

"The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration * * as a full, perfect, and final settlement of all the claims hereinbefore referred to: and further engage that every such claim * * * shall be considered and treated as finally settled, barred, and henceforth inadmissible"—(*Treaty of Wash., Art.* 11.) "And in accordance with the terms of Art. 11 of the said treaty, the Tribunal declares that 'all the claims referred to in the treaty as submitted to the Tribunal are hereby *fully, perfectly and finally settled.*'"—(*Decision and Award Papers, &c., Vol.* 4, *p.* 53.)

3.

Claim for my loss was presented to the Tribunal at Geneva, as follows:

DELPHINE.

Ship *Delphine*, of Bangor, Maine; of 705 35-95 tons burden —William Green Nichols, master. E. W. Metcalf (and others) owners. Sailed October 12, 1864, from London for Akyab; was captured and destroyed Dec. 29, 1864, in latitude 39 deg. 20 min. south, longitude 69 deg. east, by the *Shenandoah*.

Total claims filed, $93,100.00.

* * (Then follows list of items.) * *

(*Revised List of Claims, p.* 234.)

4.

Gross amount of claims for losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers..... $20,261,950 60

Less double claims for the same losses, (including about $5,700,000 by insurance companies,) prospective earnings, and gross freight, exceeding net freight, about.....	12,461,950 60
Leaving as unindemnified loss, occasioned by all the rebel cruisers, say.....	7,800,000 00
Insurers paid for war losses about.....	5,750,000 00
They received in war premiums not less than.	10,000,000 00

(*Short Hist. Long Negotiations, p.* 32.)

"The settlement of the less important matter of money indemnity was such as ought to be satisfactory to the United States, for the amount awarded is sufficient to pay a fair indemnity for all the destruction of property for which claims were presented to the Tribunal. The United States offered to accept as consideration for the national claims a rule which would have precisely the same effect as the decision excluding them, given by the Tribunal.

"The value of the property captured or destroyed had been 'recovered in the name of the Government,' and the Government left 'free to decide as to the rights and claims of insurers.'" (*Same, p.* 28.)

"Whether the sum awarded be adequate, depends, in my opinion, on whether distribution be made among actual losers only and citizens of the United States." (*Caleb Cushing in "Treaty Wash.," p.* 167.)

5.

Danger of war was averted; a benefit which cannot be estimated in money.

Advantage for neutrals was gained, which is of great prospective value to the United States.

"The world needed, and it was especially the interest of the United States, to have not only the privileges but the obligations of neutrals well defined and established.

The English agent and counsel earned the thanks of the United States, *not of England*, when they urged the fact in regard to the *Georgia*, that—

"Information about the construction and outfit of the vessel

had for a long time before her departure been in the possession of Mr. Adams, but no communication was made by him to Her Majesty's government on the subject, until six days after the ship had sailed."

When they urged that—

'The complaints of the United States might not have been necessary if Mr. Adams had communicated in good time such information as he possessed.' * * * * *

When they urged, in regard to the *Shenandoah*, that 'It will have been seen also that no representation had been made to Her Majesty's Government respecting her, by Mr. Adams'—for the decision of the Tribunal, (so valuable for neutrals, and so unfortunate for belligerents,) as regards these vessels, seems to have resulted from the lack of proof that English officials had knowledge of their character before they sailed.'—(*Short History of Long Negotiations.*)

No. 18. *Mr. Fish to Mr. Schenck.*

"* * * In this correspondence I have gone as far as prudence would allow in intimating that we neither desired nor expected any pecuniary award, and that we should be content with an award that a State is not liable in pecuniary damages for the indirect results of a failure to observe its neutral obligations. It is not the interest of a country situate as are the United States, with their large extent of sea-coast, a small navy, and smaller internal police, to have it established that a nation is liable in damages, &c. * * This Government expects to be in the future as it has been in the past, a neutral much more of the time than a belligerent." * * (*Papers, &c., Vol.* 2, *p.* 476.)

(*Telegram No.* 114, *Mr. Fish to General Schenck, and Mr. Davis.*)

* * * The President directs me to say that he accepts the declaration of the Tribunal, as its judgment upon a question of public law, which he felt that the interests of both Governments required should be decided. * * * This is the attainment of an end which this Government had in view in the putting forth of those claims. We had no desire for a pecuniary reward, but desired an expression by the tribunal as to

the liability of a neutral for claims of that character. (*Papers, &c., Vol.* 2, *p.* 578.)

"There are other assertions of important neutral right, but these are among the most important. They seem all to be available in a possible future to the United States. * * * The United States have had occasion to look practically on both sides of the question, and therefore sometimes to assert neutral duties, while more generally asserting neutral *rights* and the policy of peace, to such an extent and under such circumstances as to have rendered the United States the champion of neutral rights." * *

HAMILTON FISH.

(*Papers, &c., Vol.* 4, *pp.* 548–549.)

6.

Builder of ship *Delphine*, before H. R. Jud. Com.

7.

(*Mr. Fish to Mr. Cushing, and same to Mr. Evarts and Mr. Waite.*

SIR: The President having appointed you one of the counsel of the United States in the matter submitted to the Tribunal of Arbitration, to meet at Geneva, * * it becomes necessary to give you briefly the President's instructions on the subject of your duties. * *

The President desires to have the subject discussed as one *between the two Governments*, and he directs me to urge upon you strongly to secure, if possible, the award of a sum in gross. In the discussion of this question, and in the treatment of the entire case, you will be careful not to commit the Government as to the disposition of what may be awarded. * * It is possible that there may be duplicate claims for some of the property alleged to have been captured or destroyed, as in the cases of insurers and insured. The Government wishes to hold itself *free to decide as to the rights and claims of insurers* upon the termination of the case. If the value of the property captured or destroyed be recovered *in the name of the Government, the distribution of the amount recovered will be made by this Gov-*

ernment without committal as to the mode of distribution. It is expected that all such committal be avoided in the argument of counsel. (*Papers, &c., Vol. 2, p.* 414.)

In accordance with these instructions, our counsel said to the Tribunal:

"From these arrangements of the Treaty, it is apparent: * * Second. That these claims are all preferred by the United States as a nation against Great Britain as a nation, and are to be so computed and paid, whether awarded as 'a sum in gross,' under the seventh article of the Treaty, or awarded for assessment of amounts, under the tenth article."

8.

The Tribunal acted without objection upon this statement, (see note 7,) and *awarded a sum in gross, in satisfaction of all the claims*—as far removed as possible from deciding whom the United States should indemnify from the award.

9.

Insurers paid for war losses about $5,750,000. They received in war premiums at least $10,000,000.

10.

"From these arrangements of the Treaty, it is apparent: First. That the High Contracting Parties have found (in the public act of the government of Great Britain, expressing the regret of that government for certain occurrences in the past, and in the joint public act of the two governments, by which they agree to observe, 'as between themselves in future,' the rules established as the law of this arbitration, 'and to bring them to the knowledge of other maritime powers, and to invite them to accede to them,') the *means of reducing the measure of the complaint, and demand for indemnity*, insisted upon by the United States and contested by Great Britain before this Tribunal, to all the claims of the United States 'growing out of *acts committed by the described vessels.*' (*Argument of Counsel U. S., Papers, &c., vol. 3, p.* 16.)

"It cannot therefore be doubted that, in the beginning of the year 1871, it was well understood by both Governments that the United States maintained that Her Majesty's Government ought, under the law of nations, to make good to them the losses which they had suffered by reason of the acts of all the cruisers typically represented by the *Alabama*. *It is also equally clear that the claims for compensation founded upon the Queen's proclamation were abandoned by President Grant.*"—(*Argument of U. S. at Geneva, Papers, &c., vol. 3, p.* 196.)

"While in the treaty, the United States abandoned their claims for *the premature recognition* of belligerent rights." (*Same, p.* 203.)

"According to Sir Stafford Northcote, also, the claims abandoned by the United States were those 'growing out of the premature recognition of belligerency.' * * * He said that the 'large class of claims upon which the Americans had hitherto insisted' were to be 'shut out,' not because they were expressly excluded by the terms of the treaty, but because, 'by confining the reference solely to losses growing out of the acts of particular vessels,' the parties had, in his judgment, made it impossible for the United States to connect the objectionable claims with what the treaty pointed out as the only cause of the injuries which the arbitrators could regard." (*Same, p.* 204.)

"They (English statesmen) felt that they had protected Great Britain by the condition which they had imposed upon the United States, obliging them to trace all their complaints of injury to *the acts of the cruisers* as the *originating* cause of the damage." (*Same, p.* 205.)

"The Johnson-Clarendon Treaty did not exclude from consideration, at least by words of express exclusion, claims of the United States on account of the premature recognition by Great Britain of the insurgents. * * * When the treaty of Washington came under discussion in Parliament, Lord Granville said, and said truly, that in this respect the treaty of Washington had advantages over the Johnson-Clarendon Treaty. The former did not, like the latter, comprehend the belligerency question as a ground of claim. * * * *

"It was understood, and it is understood, that the former class of injuries (on account of the Queen's proclamation) are

not comprised in the treaty, but are in effect excluded by the express language of the treaty, which confines reclamation to acts of the Confederate cruisers." (*Same, p.* 209.)

12.

The Clarendon-Johnson Convention was rejected for national reasons, and to the injury of individual sufferers, (if they were not to be indemnified by our Government,) for by that convention the unwarrantable recognition was to be considered as a basis of claims. Our Minister, Reverdy Johnson, says of that convention: "This question, (recognition of belligerent rights,) as well as the question whether this [the English] Government had observed their neutral obligations in suffering the *Alabama* and other vessels to be built and escape from their ports, will be both before the Commission and the umpire. That their decision will be in favor of the United States, I do not doubt. The reasons for this conviction I will briefly state: First, The recognition of belligerent rights. The history of the world furnishes no instance of so speedy a recognition in the case of revolutionary efforts to subvert an existing government. At the time it was made, the insurgents had no port within which to build a ship of war, large or small, or the power to get her out if she was built. Nor had they any port to which they could carry any ship that they might capture as prize of war for condemnation in a court of admiralty. * * Upon this ground, then, independent of the question of proper diligence, the obligation of Great Britain to meet the losses seems to me to be most apparent. * * * I am satisfied that if the convention goes into operation, every dollar due on what are known as the Alabama Claims, will be recovered."—(*Johnson to Seward, Mess. and Doc. Dept. State, Part* 1*st*, 1868 *and* 1869, *p.* 411.)

The Queen's proclamation granting belligerent rights was issued before Mr. Adams, our Minister, had been received by the British government. At his first interview he said: "I must be permitted to express the great regret I had felt on learning the decision to issue the Queen's proclamation, which at once raised the insurgents to the level of a belligerent State.

* * * It considered them a maritime power before they had ever exhibited a single privateer on the ocean." (*Cor. Concerning Claims* vs. *G. B.*, *vol.* 1, *pp.* 183–'4.)

Mr. Adams, in an official interview with the British government, (April 15, 1862,) said: "I beg, furthermore, to advance an opinion that there is not an example in all the history of the United States or of Great Britain—nay, I might say of any civilized nation of the world—of so precipitate a recognition of belligerent rights to insurgents as this one of which we are treating." (*P.* 240.)

Our Government said, October 5, 1863: "The successive preparations of hostile naval expeditions in Great Britain are regarded here as fruits of that injudicious proclamation." (*P.* 270.) And January 6, 1864: "On our part, we trace all the evils to an unnecessary and, as we think, an anomalous recognition by Her Majesty's government." * * * (*P.* 273.)

In a formal note to the British government, dated May 20, 1865, our Government maintained—

First. That the act of recognition * * was precipitate and unprecedented.

Second. That it had the effect of creating these parties belligerent after the recognition, instead of merely acknowledging an existing fact. * *

Fourth. That during the whole course of the struggle in America, of nearly four years duration, there has been no appearance of the insurgents as a belligerent on the ocean, excepting in the shape of British vessels, constructed, equipped, supplied, manned, and armed in British ports. * *

Seventh. That the failure to check this flagrant abuse of neutrality, * * with the aid of the recognition of their belligerent character, has resulted in the burning and destroying on the ocean a large number of merchant vessels and a very large amount of property belonging to the people of the United States. * *

Ninth. That the injuries thus received are of so grave a nature as in reason and justice to constitute a valid claim for reparation and indemnification. * *

The nation that recognized a power as a belligerent before it had built a vessel and became itself the sole source of all the

belligerent character it has ever possessed on the ocean, must be regarded as responsible *for all the damage* that has ensued from that cause.—(*P.* 304.)

13.

"They (the English statesmen) felt that they had protected Great Britain by the condition which they had imposed upon the United States, obliging them to trace all their complaints of injury to the acts of the cruisers, as the originating cause of the damage." —(*Amer. Argument at Geneva, Papers, etc., Vol.* 3, *p.* 205.)

According to Sir Stafford Northcote, "by confining the reference solely to losses growing out of the *acts of particular vessels*," the parties had, in his judgment, made it impossible for the United States to connect the objectionable claims with what the treaty pointed out as the only cause of the injuries which the Arbitrators could regard.—(*Same*, 204.)

14.

London Times, May 24, 1873, as quoted in Foreign Relations of the U. S., 1873, part 1, p. 368.

15.

London Times, May 27, 1873, as quoted in Foreign Relations of the U. S., part 1, p. 371.

16.

Same, page 377.

17.

"In the discussion of this question, and in the treatment of the entire case, you will be careful *not to commit the Government as to the disposition of what may be awarded.*" (*Instructions to Counsel at Geneva.*)

18.

"If the value of the property captured or destroyed be re-

covered in the name of the Government, *the distribution* of the amount awarded *will be made by this Government.*" (*Same.*)

19.

See Revised List of Claims.

20.

"When the granting to the Confederates the privileges of belligerents resulted in the manning and sailing from the Mississippi of the *Sumter*, she received in British ports so warm a welcome and such effective aid as to encourage the fitting out of others from Southern ports, and the building of still others in British ports. In every British port these British-caused or British-built corsairs were sure to receive congratulations for destructions already accomplished, and assistance to enable them still to destroy the merchant vessels belonging to citizens of the United States. Thus, Great Britain was the moral cause of, and became morally responsible for, all the destructions of American vessels. It was but simple justice which afterwards compelled her to pay an amount sufficient to indemnify the losers for all this destruction.

The *Sumter* escaped June 30, 1861. On July 3 she destroyed ship *Golden Rocket*, of Bangor, Maine. A question of great interest to ship-owners at once arose, Are the insurers bound to pay the owners for this loss? The owners claimed that the covenants of their policy entitled them to recover. The insurers refused payment. The owners appealed to the courts. The courts sustained the refusal. This so much alarmed ship-owners that most of them at once paid extra premiums for special war insurance. Thus, although the amount of property destroyed by the *Sumter* was small, the indirect injury occasioned by her to owners of American vessels was very great. The whole amount claimed for destructions by her is but $179,697.67.

The next vessel which escaped from a Southern port, and was welcomed and assisted in English ports, was the *Nashville.* She escaped from Charlestown October 26, 1861. On the 19th of November, after having been entertained and supplied at

Bermuda, she burned ship *Harvey Birch*, and on February 26, 1862, schooner *Robert Gilfillan*. Their value was claimed to be about $90,000. All the other destructions, for which claims have been preferred to our Government, were caused by British-built vessels or their tenders, except the trifling amounts of loss by the *Boston*, *Jeff Davis*, *Retribution*, and *Sallie*, the claims for which in the aggregate amount to but $42,710.53, of which $30,896.53 is claimed by insurance companies. There were six of these British-built cruisers, (the *Florida*, *Alabama*, *Georgia*, *Tallahasse* or *Olustee*, *Chickamauga*, and *Shenandoah*,) three of which, the *Alabama*, *Georgia*, and *Shenandoah*, were never in a port of the so-called Confederate States.

A very large majority of all the injury done to American commerce by Confederate cruisers was done by the *Alabama*, the *Florida*, with her tenders, (the *Clarence* and *Tacony*,) and the *Shenandoah*, the amounts claimed being for the *Alabama*, $7,050,293.76; *Florida* and her tenders, $4,293,869.60; *Shenandoah*, $6,656,838.81, making more than eighteen million dollars.

The amounts claimed for loss by the *Chickamauga*, *Georgia*, and *Tallahassee* were respectively $183,070.73, $431,160.72, and $836,841.83, or $1,451,073.28 (less than one and a half million) for the three. It should be remembered that in these several amounts claimed are included the very large amounts which were so properly set aside by the Geneva Tribunal as "prospective earnings," "double claims for the same loss, and gross freight exceeding net freight."

[These figures will be of interest when noticing the results of the Geneva arbitration. The Tribunal established rules of international liability which would cover the acts of the *Alabama*, the *Florida* and her tenders, and of the *Shenandoah* after she left Australia, or nearly seventeen millions five hundred thousand dollars of gross claims; while the gross claims for the acts of the *Shenandoah* before she reached Australia, and of all the other cruisers, are less than two million three hundred thousand dollars.] (*Short History of Long Negotiations.*)